



Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: Intown Properties, Inc.

File: B-256742

Date: July 11, 1994

Melton Harrell for the protester.
John P. Opitz, Esq., Department of Housing and Urban Development, for the agency.
Mary G. Curcio, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that procuring agency improperly awarded contract to offeror that submitted a below-cost offer is dismissed as there is no legal objection to the submission or acceptance of a below-cost offer where a fixed-price contract is to be awarded. Whether offeror can perform at offered price concerns the contracting officer's affirmative determination that the offeror is responsible, a matter not subject to review under the circumstances.

2. Notwithstanding solicitation award criteria that gave greater weight to technical factors than to price, procuring agency properly awarded contract to lower-priced, lower technically rated offeror where source selection official reasonably determined that protester's technically superior proposal was not worth the price premium associated with it.

DECISION

Intown Properties, Inc. protests the award of a contract to Prose Management, Inc. under request for proposals (RFP) No. HO1R93000900000, issued by the Department of Housing and Urban Development (HUD) for real estate asset management (REAM) services. Intown asserts that HUD improperly awarded the contract to Prose on the basis of its lower price because the solicitation emphasized that technical factors were more important than price and it submitted a proposal that was technically superior to the proposal submitted by Prose.

We deny the protest in part and dismiss it in part.

The RFP contemplated the award of a firm, fixed-price indefinite quantity contract for REAM services for single family properties owned by HUD in Maine, New Hampshire, and Vermont. The REAM contractor is to manage HUD properties obtained through foreclosure or assignment of HUD-insured mortgages to assure proper maintenance and management of the properties until sold.

The solicitation statement of Work (SOW) listed 30 services that the contractor is to provide, including snow removal, grass cutting, and inspecting for damage. Offerors were required to offer a fixed price per property as full compensation for performance of all services listed in the SOW. The solicitation provided that it was the government's intent to award a contract to the offeror whose proposal was considered most advantageous (represented the best value to the government) considering the RFP's technical criteria and price. The RFP also stated that in the award decision, the technical criteria were considered of greater importance than price. The RFP listed six technical criteria against which proposals would be evaluated:

- "1. Demonstrated experience in the management of single family properties similar to and in the general area as those covered by this solicitation.
- "2. Demonstrated experience in pricing properties similar to those covered by this solicitation, utilizing the comparable sales technique.
- "3. Demonstrated experience in developing listing of needed repairs, such as is required by HUD's MPS [minimum property standards], and estimating the cost of repairs.
- "4. Demonstrated experience in soliciting repair bids, coordinating and overseeing repair work and inspecting for satisfactory work completion.
- "5. Demonstrated experience in managing a rental program, including establishing fair market rentals and collections from present and former tenants, for single family properties.
- "6. Understanding of HUD objectives and the required tasks as specified in the solicitation.
- "7. Evidence of adequately staffed, trained, and equipped office (or the ability to establish such) reasonably located so as to provide convenient service to HUD and its clients in the area to be

served, and to carry out all duties specified in the solicitation."

After initial offers were received and evaluated, the contracting officer established a competitive range which included the proposals of Intown and Prose. Subsequently, the agency held discussions with the competitive range offerors and requested each to submit a best and final offer (BAFO). The source evaluation board (Board) evaluated the BAFOs, giving Intown the highest technical score and Prose the third highest technical score; 7.1 points separated the two firms' scores. Prose submitted the lowest price of \$850 per property and Intown submitted the third lowest price of \$1,701 per property. The Board recommended award to Intown based on its higher technical score and higher combined cost and technical score. However, the source selection official (SSO) disagreed, concluding that the technical superiority exhibited by Intown's proposal was not worth the price premium associated with the proposal.² Accordingly, he awarded the contract to Prose based on the strengths in its technical proposal and its substantially lower price.

Intown asserts that in proposing its price, Prose failed to consider that the properties to be managed will be in inventory for an average of 18 months compared to the usual average of 4 to 6 months for REAM properties. Based on its experience as the incumbent, Intown asserts that this additional time in inventory will substantially increase the cost of managing the properties because of the additional mowing, snow removal, and inspections that will be required. Intown therefore protests that its experience as the incumbent shows that Prose submitted a price which is lower than the price for which the work can actually be

¹The combined score was based on a formula that was not disclosed in the solicitation, but, as required by the solicitation, weighted the technical proposals significantly more than the prices.

²The SSO who is responsible for selecting the awardee is not bound by the recommendation of the evaluation board.

Arthur D. Little, Inc., B-243450, July 31, 1991, 91-2 CPD ¶ 106.

performed.³ Intown asserts that in awarding the contract to Prose, HUD did not consider these additional expenses.

There is no prohibition against an offeror's submitting, or a procuring agency's accepting, an unreasonably low or below-cost offer on a fixed-price contract. Monopole S.A., Inc., B-254137, Nov. 4, 1993, 93-2 CPD ¶ 268. Accordingly, Intown's protest is dismissed to the extent Intown argues that Prose submitted a below-cost offer.

Further, Intown's argument that Prose will be unable to perform the contract at its offered price concerns Prose's responsibility. By awarding the contract to Prose, HUD has necessarily determined that Prose is responsible. Our Office will not review that determination absent a showing of possible fraud or bad faith or that definitive responsibility criteria in the solicitation have been misapplied. Id.; 4 C.F.R. § 21.3(m)(5) (1994). Intown has made no such showing. In any case, we note that in awarding the contract, the SSO considered Prose's low price and determined that Prose would be able to perform at that price since Prose currently was performing similar services for HUD at other locations.

Intown also asserts that it should have received the award because it submitted a proposal that was technically superior to the proposal submitted by Prose. Intown specifically asserts that it has demonstrated an outstanding level of competence, capability, compliance with HUD policies and procedures, and cooperation with the staff of each HUD office for which it has worked. According to Intown, selection of a less qualified contractor is contrary to HUD's procurement procedures and to the best interests of the government.

Notwithstanding a solicitation's emphasis on technical factors, an agency properly may award a contract to a lower-priced, lower technically scored offeror if it decides that the cost premium involved in awarding to a higher-rated, higher-priced offeror is not justified given the acceptable

³Intown characterizes this contention as a protest that Prose submitted an unbalanced offer. Unbalancing, however, occurs where a bidder or offeror submits nominal prices for some items or services and enhanced prices for other items or services in such a way that an award to the bidder or offeror might not result in the lowest cost to the government. See Stocker & Yale, Inc., B-249466.2, Jan. 29, 1993, 93-1 CPD ¶ 88. This is not the argument that Intown is making; Intown has not argued that Prose's proposal included enhanced prices for some items. Rather, Intown simply argues that Prose submitted a below-cost offer.

level of technical competence available at the lower price. General Offshore Corp., B-246824, Apr. 1, 1992, 92-1 CPD ¶ 335. The determining element is not the difference in technical merit, per se, but the contracting agency's judgment concerning the significance of that difference. Id. Where the award is made to the lower-priced, lower-rated offeror, notwithstanding an evaluation scheme placing primary importance on technical considerations, we will review the agency's selection decision to determine whether it is supported by a reasonable justification. Family Realty, B-247772, July 6, 1992, 92-2 CPD ¶ 6.

Here, the record shows that in recommending award to Intown, the Board considered as weaknesses in Prose's proposal that Prose had only one central office to service the properties in all three states while Intown proposed locating an office in each of the three states. In addition, the Board considered that the contact person between HUD and Prose would be the same person performing the property inspections. Finally, the Board was concerned that Prose might not be able to perform at its offered price.

In disagreeing with the Board's recommendation, the SSO determined that the differences in the technical proposals did not indicate a significant difference in the technical competence of the offerors that would warrant paying a substantial price premium. Specifically, he noted that the solicitation did not request or require offerors to establish an office in each state. In addition, he concluded that using the HUD contact person to inspect the properties was actually an advantage because HUD would be getting direct, firsthand information as to the condition of the properties. He also considered that the Board had noted several strengths in Prose's proposal, including experience in handling inventories of more than 200 properties in different geographic regions and its successful performance of REAM contracts in other HUD areas. Finally, as discussed above, based on Prose's performance history, he disagreed that Prose would be unable to perform the contract at its offered price. This is the type of decision that is within the discretion of the SSO to make--we see nothing unreasonable about his conclusions or the ultimate determination that an award to Intown was not worth a substantial price premium.

The protest is denied in part and dismissed in part.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel